BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

IN THE MATTER OF

PROCEDURES FOR REVIEWING REQUESTS FOR RELIEF FROM STATE AND LOCAL REGULATIONS PURSUANT TO SECTION 332(c)(7)(B)(V) OF THE COMMUNICATIONS ACT OF 1934

97-192
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REPLY COMMENTS OF PALM BEACH COUNTY, FLORIDA

Palm Beach County, Florida by and through undersigned counsel hereby submits these reply comments in the above referenced proceeding. Palm Beach County believes that the Commission should not preempt the ability of local governments to require monitoring of wireless towers after construction and to require the wireless industry to pay the costs of a monitoring program. The Commission should not by rule weaken the local government decision making process regarding wireless facility siting. Therefore, the Commission should not allow preemption of local government decisions based on indirect consideration of RF emissions. The Commission should not determine average lengths of time it takes to issue various permits, as the length of hearing varies based on the facts of each particular case. Finally, homeowners associations and other private entities should not be treated as local governments and subject to Commission review.

I. RF Monitoring

Palm Beach County believes that local governments need to be able to demonstrate to the general public that the growing wireless presence in the community is safe and in compliance with Commission RF standards. Demonstrations of compliance regarding operating facilities will reassure the public regarding the general safety of wireless facilities. The alternative proposals

contained in paragraphs 142-146 of the Notice of Proposed Rulemaking regarding the types of information regarding RF compliance that a state or local government can request during the application process does not address monitoring after the installation of the wireless facilities. Palm Beach County endorses Advisory Recommendation Number 5 of the Commission's Local and State Government Advisory Committee (LSGC) which is quoted and discussed in the comments of Concerned Communities and Organizations (CCO) at 19 "that the Commission establish a mutually acceptable RF testing and documentation mechanism that providers *may* use to demonstrate compliance with RF radiation guidelines, and state and local governments *may* accept as demonstrating compliance with such guidelines." The variety of approaches that local governments have taken regarding monitoring described by ATT Wireless Services Inc. in its Comments at N7 at pages 4-6 demonstrates the need for Commission guidelines regarding RF monitoring. Without Commission guidelines, each government will by necessity develop their own approach to monitoring and each wireless carrier will be forced to deal with a variety of monitoring approaches in different jurisdictions. Commission guidelines regarding monitoring should be flexible to allow local flexibility regarding the degree of monitoring that is perceived as necessary in a community.

II. There Should be No Preemption of State or Local Zoning Decisions Based on Indirect RF considerations.

In Florida, site specific local zoning decisions are quasi-judicial in nature, and are reviewed by courts utilizing a standard of competent substantial evidence, procedural due process and departure from the essential requirements of law. Courts reviewing a decision do not reweigh the evidence but determine if there is competent evidence to support the decision. As Section 332(c)(7)

(B)(iii) of the Telecommunications Act requires that decisions be based on substantial evidence contained in a written record, it is inappropriate to hunt through the record for hidden motives. As pointed out by the comments of the National League of Cities and the National Association of Telecommunications Officers at 17-18 it is improper to look at the motives of elected officials in decision making. If a hearing was unfair because the hearing was permeated with irrelevant discussion of RF safety, a court can find a departure from the essential requirements or a violation of procedural due process of law and order a new hearing. As there are already adequate remedies to review zoning decisions regarding wireless placement in court, there is no need for Commission review of indirect RF considerations.

III. The Commission Should Not Determine The Average Time For Processing Various Types of Approvals

Zoning is inherently local in nature. Procedural requirements differ based on variations in state law and variations in local procedures. It is interesting that two wireless providers offer differing time periods as reasonable for state and local governments to wireless decisions. GTE Service Corporations in its comments at 3 states that six months is the appropriate time period regarding the resolution of siting concerns, while the Cellular Telecommunications Industry Association (CTIA) believes that 90 days is the appropriate time period. CTIA comments at 5. In reality, a reasonable time frame for a decision will depend on the type of approval that is needed, the legal requirements for public hearings and notice in a particular jurisdiction, the completeness of an application, the issues raised during the review process and the complexity of the public hearing or hearings. If a public hearing is held regarding a controversial item, a hearing may take many hours

spread over several meetings. As many decision making bodies making land use and zoning decisions meet only once a month, a controversial item can take an undetermined time period for consideration. One variable is the type and extent of the case an applicant wishes to present. It is inappropriate for the Commission to come up with average time periods on a national basis. Section (7)(B)(iii) of the Telecommunications Act requires a state or local government to act on wireless decisions "within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." Such determination must be based on the unique facts of each case.

IV. Private Associations Should Not be Treated as Governments and Subject to Commission Regarding Placement of Wireless Facilities

Palm Beach County agrees with the comments by Orange County, Florida at 5, and Concerned Communities and Organizations at 35 that homeowners associations and private land covenants cannot be considered state and local governments for purposes of preemption pursuant to the Telecommunications Act. Wireless carriers must compete in the open market place for sites for their facilities. In addition to state and local development regulations, a carrier must find a willing property owner who will sell or otherwise allow placement of a facility on property. If there are private restrictions on property placed that prohibit the use of the property by a wireless carrier, the carrier must find another location. This is by no means similar to the exemptions to private restrictions the Commission has granted to the installation of certain satellite dishes and antennas. For example, the exemption regarding satellite dishes is for satellite dishes 39" in diameter or smaller. In contrast, wireless towers are of varying heights and may have significant and dramatic

visual impacts. It is therefore imperative that private associations retain control over the properties within their jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and nine (9) true and correct copies of the foregoing has been furnished by Federal Express this 23rd day of October, 1997, to the Secretary, Federal Communications Commission, Washington, D.C. 20554 in accordance with Para. 158 of FCC No. 97-303.

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cc: Shaun A. Maher, Esquire, Federal Communications Commission (w/disc enclosure)
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